No. 95-1100

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,
Petitioner,
v.
JILL BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a local government can be held liable under § 1983 for hiring a law enforcement officer with a prior misdemeanor record, where there has been no showing that it was obvious to the policymaker that the hiring decision was substantially likely to cause the violation of Fourth Amendment rights.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include county and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect local governments. The resolution of the question presented in this case—whether, and

under what circumstances, a local government can be held liable under 42 U.S.C. § 1983 for having a policy of "inadequate hiring" of law enforcement personnel —threatens to expose local governments to unprecedented liability.

In most States, a record of misdemeanor offenses does not *per se* disqualify a person from being hired as a law enforcement officer. *See* Appendix. Rather, it is only one of several criteria evaluated in the inherently subjective hiring decision, which commonly includes psychological testing and interviews of the candidate and other persons. *See* Commission on Accreditation for Law Enforcement Agencies, *Standards For Law Enforcement Agencies* 32-2—32-3 (3d ed. 1994). The standard of liability adopted by the court of appeals would involve federal courts in "an endless exercise of second-guessing" police hiring decisions, with grave consequences for the administration of local law enforcement agencies. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989).

Because this issue is of fundamental importance to *amici* and their members, this brief is submitted to the Court to assist it in the resolution of this case.[1]

STATEMENT OF THE CASE

Respondent Jill Brown was injured when she was arrested by Reserve Deputy Stacy Burns following a high speed chase from a routine checkpoint. Pet. App. 4a-5a. Burns was employed by petitioner Bryan County, Oklahoma as a reserve deputy sheriff at the time of the arrest. Respondent's injuries were

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

sustained as a direct result of the forcible arrest effectuated by Burns. Pet. App. 5a.

Burns had been hired as a reserve deputy sheriff by Bryan County Sheriff B.J. Moore under authority conferred by the legislature of the State of Oklahoma. Okla. Stat. tit. 19, § 547(B). While Burns had a prior criminal record consisting of various traffic offenses and other misdemeanors, this did not disqualify him from law enforcement employment under guidelines adopted by Oklahoma. Okla. Stat. tit. 70, § 3311(D)(2)(a). In addition, Burns had completed the Minnesota Multiphasic Personality Inventory, which is a psychological evaluation that addresses a person's suitability for law enforcement work. Tr. 578; Okla. Stat. tit. 70, § 3311(D)(2)(b).

Under state law, reserve deputies must be accompanied by a "salaried deputy sheriff" while performing their duties until they have completed a full 120-hour training course. Okla. Stat. tit. 19, § 547(B). Because Burns was in the process of completing this course, Sheriff Moore ordered him to be accompanied by a regular deputy and prohibited him from either carrying a firearm or operating a patrol car. J.A. 117a-118a.

Before the incident, Burns had received on-the-job training from regular law enforcement officers of Bryan County. Burns had accompanied officers as they performed their duties and instructed him on proper police procedure. Tr. 580-81. Burns had participated with experienced officers in a number of similar roadblocks. Tr. 583. Burns had watched the Law Enforcement Training Network programs, which are a series of closed-circuit television programs that instruct police officers. Tr. 579. Burns was

attending the Council on Law Enforcement Education and Training (CLEET) program, which is Oklahoma's legislatively-mandated law enforcement education program. Tr. 577-78, 608; Okla. Stat. tit. 70, § 3311.

Respondent brought suit against Burns, Moore, another deputy, and petitioner Bryan County. Respondent sued Burns under 42 U.S.C. § 1983 for excessive force, false arrest, and false imprisonment. Pet. App. 6a. She also sought damages from the County on the ground that Moore, a County policymaker, had improperly hired and inadequately trained Burns. Pet. App. 6a. The district court granted summary judgment to Moore and the other deputy on the § 1983 claims against them. J.A. 28a. The case went to trial on the claims against Burns and Bryan County. Following a jury verdict in favor of respondent, the County appealed.

The Fifth Circuit held that the County could be held liable for Moore's decision to hire Burns. The court reasoned that Moore's decision could be said to fairly represent County policy on employment. Pet. App. 16a-17a. According to the court, the jury could reasonably have found that Moore's hiring of Burns constituted "deliberate indifference to the public's welfare." Pet. App. 23a. The court also concluded that sufficient evidence existed to show that the hiring "actually caused" respondent's injuries. Pet. App. 24a.

The Fifth Circuit originally rejected respondent's failure to train claim on the ground that respondent had not shown a pattern of similar incidents. *Brown v. Bryan County*, 53 F.3d 1410, 1424-25 (5th Cir. 1995). This opinion, however, was superseded by the

Fifth Circuit opinion now on review, which does not discuss the training issue. Pet. App. 4a n.1.

SUMMARY OF ARGUMENT

This Court consistently has rejected efforts in § 1983 cases to impose *respondeat superior* liability upon municipalities for the actions of their employees. By holding petitioner liable in this case for the single act of hiring an employee, the Fifth Circuit decision threatens, contrary to this Court's decisions, to create a regime of *de facto respondeat superior* liability.

Municipalities are liable only for policies that directly cause constitutional deprivations. In cases where the policy itself is unconstitutional or specifically orders or authorizes unconstitutional action, a plaintiff need only show a single deprivation. Where, however, no such facially unconstitutional policy can be identified, a plaintiff must show that the municipality was deliberately indifferent to his constitutional rights. Such a showing requires "considerably more proof" than a single incident of a constitutional deprivation.

To prevent the deliberate indifference standard from devolving into *de facto respondeat superior* liability, this Court has required plaintiffs to show a close causal link and a high degree of foreseeability between the constitutional deprivation at issue and the policymaker's decision. In addition, to ensure that the municipality has notice of the deprivation and that it is not an isolated incident unrelated to the alleged policy, the plaintiff usually must show a pattern of similar violations.

In this case, it is clear that the hiring decision at issue was not itself unconstitutional; it was made

within the dictates of Oklahoma state law and all existing constitutional doctrine. Respondent's deliberate indifference claim relating to hiring must fail because she did not establish, as required by this Court's decisions, either that the deprivation was a "morally certain" or "obvious" consequence of the hiring decision, or that respondent's hiring decisions had produced a pattern of similar incidents.

For similar reasons, respondent's failure to train claim, which was the second basis for liability in the district court, is also without merit. Petitioner did in fact train Burns in how to make forcible arrests. Thus, respondent's contention is that Burns' training was inadequate, as opposed to completely absent. To establish deliberate indifference under these circumstances, a plaintiff must, at a minimum, show a pattern of similar incidents. A pattern of incidents puts the municipality on notice of a problem in the training program and supports the conclusion that municipal policy rather than some alternative explanation is responsible for the deprivation. Because respondent failed to show any such pattern, her failure to train claim is meritless.

ARGUMENT

I. BRYAN COUNTY IS NOT SUBJECT TO SECTION 1983 LIABILITY FOR THE DECISION TO HIRE STACY BURNS

The court of appeals approved an unprecedented extension of municipal liability under 42 U.S.C. § 1983 for a single hiring decision by a municipal policymaker. Nothing in the Constitution or this Court's decisions proscribes the appointment of law enforcement personnel who have prior records of misdemeanor offenses.

In almost every State, a prior misdemeanor record does not disqualify a candidate from service as a police officer. *See* Appendix. With regard to arrests, this Court itself has stated that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957). Even with regard to misdemeanor convictions, most States treat such convictions as simply a factor to be evaluated along with such other criteria as the results of emotional stability and psychological fitness examinations, polygraph examinations, oral interviews with the candidate and neighbors, and personal references. *See* Commission on Accreditation for Law Enforcement Agencies, *Standards For Law Enforcement Agencies* 32-2—32-3 (3d ed. 1994).[2]

The hiring decision thus involves an ad-hoc evaluation of diverse and inherently subjective criteria. These judgments should not be subjected to "an endless exercise of second-guessing" by the federal courts. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). Holding municipalities liable based on the wisdom of individual hiring decisions is fundamentally at odds with this Court's decisions establishing that such liability is only justified where municipal policy is the "moving force [behind] the constitutional violation." *Id.* at 389 (quoting *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 673 (1978); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)).

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[2] As a general rule, the States prohibit the employment as police officers of persons with felony convictions. *See* statutes cited in appendix.

A. An Otherwise Constitutional Hiring Decision Does Not Subject A Local Government To Liability Under § 1983 Unless It Was "Morally Certain" Or "Obvious" That It Would Cause The Violation Of Plaintiff's Constitutional Rights

This Court's section 1983 municipal liability jurisprudence has never wavered from the principle that a local government may not be held liable for the actions of their employees under the doctrine of *respondeat superior*. *See, e.g., City of Canton*, 489 U.S. at 388-92; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 & n.5 (1985); *Monell*, 436 U.S. at 693-94. The decision of the court below is flatly at odds with these precedents. It threatens to expose municipalities to a flood of § 1983 suits grounded solely in the isolated acts of municipal employees and thus to eviscerate the well-established principle that a municipality (and its citizenry) "cannot be held liable *solely* because it employs a tortfeasor." *Id.* at 691.

A municipality can be held liable under section 1983 where the allegedly unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690. The "policy" requirement ensures that a municipality is held liable only for "acts which the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S. at 480. It is legally insufficient for a plaintiff seeking to impose liability on a municipality to prove only that a municipal employee inflicted the injury. *See Monell*, 436 U.S. at 691-94.

In rejecting *respondeat superior* liability, the *Monell* Court emphasized that municipal liability is

permissible only if "action pursuant to official municipal policy of some nature caused a constitutional tort." 436 U.S. at 691. By its terms, section 1983 imposes liability on any person who "shall subject, or cause to be subjected" any person to a constitutional deprivation. In *Monell*, the Court held that this language does not permit municipalities to be held vicariously liable; instead, it imposes liability only where the municipality "under color of some official policy, 'causes' an employee to violate another's constitutional rights." 436 U.S. at 692 (quoting 42 U.S.C. § 1983). Thus, there must be a "direct causal link" between some official municipal action and the constitutional deprivation at issue. *City of Canton*, 489 U.S. at 385; *see also Tuttle*, 471 U.S. at 824 n.8 (plurality opinion) ("There must at least be an affirmative link between [the municipal policy] and the particular constitutional violation at issue.").

This Court has further held that there are two ways to satisfy these prerequisites to municipal liability. First, a municipal policy may itself be unconstitutional or may directly order or authorize a constitutional deprivation. *See Monell*, 436 U.S. at 660-61; *Pembaur*, 475 U.S. at 482 n.11. Second, a plaintiff may establish that the municipality was deliberately indifferent to his constitutional rights. *See City of Canton*, 489 U.S. at 388. Both of these lines of cases preserve this Court's commitment to the idea that the constitutional injury must directly result from conduct or willful inaction that represents municipal policy.

Unconstitutional Policies. The core circumstance for finding municipal liability is presented by a municipal policy that itself affirmatively authorizes the

constitutional wrong.[3] Where that is true, the connection between the policy and the harm is obvious. As a result, "[p]roof of a single incident of unconstitutional activity is . . . sufficient to impose liability under *Monell*" when "proof of the incident includes proof that it was caused by an existing unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Tuttle*, 471 U.S. at 823-24 (plurality opinion).

Monell itself involved a facially unconstitutional municipal policy that compelled pregnant employees to take unpaid leaves of absence before they were medically required, in violation of *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). *See Monell*, 436 U.S. at 660-62. Thus, the policy itself was unconstitutional. *See Tuttle*, 471 U.S. at 822 (plurality opinion); *see also Owen v. City of Independence*, 445 U.S. 622, 625-34 (1980) (legislative action in violation of *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sinderman*, 408 U.S. 593 (1972)).

In *Pembaur*, this Court extended *Monell* to hold that a single decision by a policymaker can be the basis for municipal liability when the decision orders or authorizes an unconstitutional act. 475 U.S. at 480. The *Pembaur* Court, however, reaffirmed *Monell*'s rejection of *respondeat superior* liability. 475 U.S. at 478-80.

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[3] A policy is a generally applicable rule promulgated by a municipal entity competent in such matters: " '[O]fficial policy' often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 U.S. at 480-81.

In *Pembaur*, a city prosecutor directed law enforcement personnel to forcibly enter third party property in order to effect an arrest, in violation of *Steagald v. United States*, 451 U.S. 204 (1981). *See* 475 U.S. at 474. Like *Monell*, therefore, *Pembaur* involved a policy that itself violated the Constitution. In that circumstance, the Court held that a "policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers." *Pembaur*, 475 U.S. at 482 n.11; *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 250-52 (1981) (executive action by city council in violation of First Amendment).

Deliberate Indifference. In cases not involving facially unconstitutional policy, the argument for imposing municipal liability is considerably weaker. As Chief Justice Rehnquist has explained, where the plaintiff alleges only that a municipality failed to prevent its employees from violating the Constitution, "the 'policy' . . . is far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*." *Tuttle*, 471 U.S. at 822 (plurality opinion).

In *City of Canton*, this Court held that where the municipality has not adopted a facially unconstitutional policy, § 1983 can give rise to municipal liability only in "limited circumstances." *See* 489 U.S. at 387. Specifically, the Court held that a municipality's failure to train its employees can support municipal liability "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The Court emphasized that because the deliberate indiffer-

ence standard must "reflect[] a 'deliberate' or 'conscious' choice by a municipality," even a showing of "gross negligence" is legally insufficient to support liability. *See id.* at 388-89 & n.7. Moreover, the Court stressed that application of the deliberate indifference standard must not "result in *de facto respondeat superior* liability." *Id.* at 392. *See also id.* at 394-95 (O'Connor, J., concurring in part and dissenting in part).

To prevent the deliberate indifference standard from degenerating into *de facto respondeat superior* liability, this Court in *City of Canton* adopted strict substantive and evidentiary principles to guide its implementation. As a substantive matter, the Court emphasized that deliberate indifference must reflect rigorous standards of both fault and causation.

With regard to fault, the Court stressed that the deliberate indifference standard requires a high degree of foreseeability that the acts or omissions of a municipal policymaker would result in a constitutional violation. *See* 489 U.S. at 389-90 ("it may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent"). Such a high degree of foreseeability is, as Justice O'Connor explained, necessary to avoid *de facto respondeat superior* liability:

> [T]he requisite degree of fault must be shown by proof of a background of events and circumstances which establish that the 'policy of inaction' is the functional equivalent of a decision by the city itself to violate the Constitution. Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the [deliberate indifference] theory of liability could completely engulf *Monell*, imposing liability without regard to fault.

489 U.S. at 394-95 (concurring in part and dissenting in part).

With regard to causation, the Court stressed repeatedly that there must be a "direct causal link" between the alleged municipal policy and a constitutional violation. 489 U.S. at 385; *see, e.g., id.* at 391 (alleged policy "must be closely related to the ultimate injury"); *see also id.* at 395 (O'Connor, J., concurring in part and dissenting in part) (policy must "bear a very close causal connection to the violation of constitutional rights"). Clearly, a showing of but-for causation is not enough. *See, e.g.*, 489 U.S. at 389 & n.9; *id.* at 393 (O'Connor, J., concurring in part and dissenting in part); *Tuttle*, 471 U.S. at 823 (plurality opinion). In the context of municipal liability, similarly strict causation requirements are also critical. *See City of Canton*, 489 U.S. at 391 ("To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983.").

The deliberate indifference standard also imposes significant evidentiary obligations on plaintiffs attempting to establish municipal liability. The Court has long recognized that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter." *Tuttle*, 471 U.S. at 823 (plurality opinion). Thus,

> where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Id. at 824 (footnote omitted).

In *City of Canton*, this Court recognized two types of proof that would suffice to establish deliberate indifference and therefore municipal liability. First, the plaintiff could prove to a "moral certainty" that the decision at issue would result in a constitutional violation. *See* 489 U.S. at 390 n.10. *See also id.* at 396 (O'Connor, J., concurring in part and dissenting in part) ("a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face").[4]

Second, a plaintiff could prove that the decision at issue already had produced a pattern of constitutional violations. As the Court explained, "[i]t could

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[4] As an example of this kind of proof, the Court cited a hypothetical failure to train police officers in the use of deadly force:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations of the use of deadly force, see *Tennessee* v. *Garner*, 471 U.S. 1 (1985), can be said to be 'so obvious,' that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S. at 390 n.10.

also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Id.* Thus, as Justice O'Connor confirmed, "municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations." *Id.* at 397 (O'Connor, J., concurring in part and dissenting in part).

The pattern requirement serves important functions. To begin with, it makes it very likely that the municipality's policymakers were on "notice" that its policies were inadequate to prevent constitutional violations. *See id.* at 395. *See also id.* at 397 ("a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements"). Without such notice, there is no basis to conclude that the municipality's conduct reflected a "deliberate" or "conscious" indifference to the plaintiff's constitutional rights. 489 U.S. at 389.

Moreover, the pattern requirement also eliminates causes of constitutional violations for which the local government bears no responsibility. For example, a constitutional violation might be caused by the officer's malice toward the victim, a mistake, "an otherwise sound [training] program [which] has occasionally been negligently administered," or by an inadequate program. *City of Canton*, 489 U.S. at 391. The pattern requirement is thus integral to the Court's "admonition . . . that a municipality can be liable under § 1983 only where its policies are the

'moving force [behind] the constitutional violation.' " *Id.* at 389 (citations omitted). *See also City of Springfield v. Kibbe*, 480 U.S. 257, 268 (1987) (O'Connor, J., dissenting) (listing factors other than a municipality's deliberate indifference "that were equally likely to contribute or play a predominant part in bringing about the constitutional injury"). Absent any pattern of similar violations, the conclusion "in a particular instance" that training deficiencies caused an officer's unconstitutional conduct would rest on little more than impermissible "speculation and conjecture." *Id.*

Finally, this Court repeatedly has cautioned against adopting lesser standards of fault and causation. As the Court explained in *City of Canton*, "permitting cases against cities . . . to go forward" under legally deficient standards "would result in [imposing] *de facto respondeat superior* liability on municipalities —a result we rejected in *Monell*." 489 U.S. at 392. *See also id.* at 399 (O'Connor, J., concurring in part and dissenting in part) ("Allowing an inadequate training claim . . . to go to the jury based upon a single incident would only invite jury nullification of *Monell*."); *Tuttle*, 471 U.S. at 830-31 (Brennan, J., concurring in part and concurring in the judgment) (permitting improper jury inference of municipal "policy" would "unduly threaten [the city's] immunity from *respondeat superior* liability"). As shown below, these principles require reversal of the judgment of the court of appeals.

B. There Is No Basis For Imposing Section 1983 Liability On Bryan County Based On The Decision To Hire Stacy Burns

A single hiring decision, which is not itself unconstitutional, cannot give rise to municipal liability unless it reflects deliberate indifference to the constitutional rights that were violated. In this case, respondent cannot allege that Sheriff Moore's hiring decision was itself unconstitutional or was the result of a facially unconstitutional policy. Nor can it be said that it was so "obvious" at the time of Burns' hiring that he would commit Fourth Amendment violations as to establish the County's deliberate indifference.

In upholding the jury's deliberate indifference determination, the court of appeals relied heavily on the single-act decision in *Pembaur*. This case, however, is plainly unlike that decision. As explained above, in *Pembaur* the prosecutor who ordered the unconstitutional action was the local government's policymaker; the decision itself was facially unconstitutional. By contrast, Sheriff Moore's decision to hire a reserve deputy in no way ordered or authorized a constitutional deprivation. Precisely because Moore's decision to hire did not itself violate the Constitution, *Pembaur* is inapposite.

The Fifth Circuit also reasoned that Sheriff Moore's hiring decision "amounted to deliberate indifference to the public's welfare." Pet. App. 23a. This Court has made clear, however, that the operative standard requires a showing of deliberate indifference to a discrete and identifiable constitutional right, not to some generalized notion of the public welfare. *See, e.g., City of Canton*, 489 U.S. at 390-91.

As explained above, the deliberate indifference standard requires more than a showing that the constitutional violation was merely foreseeable; rather, it must be the "obvious" consequence of the hiring decision. *See id.* at 390 n.10. Indeed, given the ex-

tensive state standards governing the selection of law enforcement personnel, *see* statutes cited in Appendix, the recognition of a § 1983 cause of action for inadequate hiring should not be lightly given.

States have extensive minimum standards governing the selection of law enforcement personnel. *See* Appendix. These standards are designed to weed out those who are unfit to serve. Hiring decisions, however, also invariably involve the evaluation of various criteria besides prior records, including psychological tests, polygraph exams, and interviews of both the candidate and other persons. The hiring decision is thus an inherently subjective process. Undoubtedly, mistakes can be made. But such mistakes are commonly errors of judgment and do not reflect a "deliberate" or "conscious" choice to violate constitutional rights.

Moreover, human experience instructs that it is no easy matter to predict future behavior based on past records. If inadequate hiring is to be recognized as a theory of § 1983 liability, the standard of liability must account for the inherently subjective nature of the hiring process. To demonstrate, even if it were the case that well researched and accepted studies showed a substantial correlation between certain prior misdemeanor convictions and constitutional violations of the kind at issue here, each hiring decision is highly individualized; candidates are routinely interviewed and psychologically evaluated. To impose liability where a hiring decision was made after a good faith effort to determine a candidate's fitness for service would be inconsistent with the requirement that a local government not be held liable unless it has made a "conscious" or "deliberate" choice which was substantially likely to violate specific constitutional rights.

In any event, respondent has offered no such evidence. Indeed, respondent has not even offered evidence showing that Bryan County was on notice from its past hiring decisions that persons with records similar to Burns were substantially likely to commit the constitutional violations that occurred here. *See City of Canton*, 489 U.S. at 390 n.10; *Tuttle*, 471 U.S. at 824. Respondent thus falls far short of showing that it was "obvious" that the County's hiring decisions would cause the violation of her Fourth Amendment rights. 489 U.S. at 390 n.10. Accordingly, her inadequate hiring claim should be rejected.

II. RESPONDENT'S INADEQUATE TRAINING CLAIM IS WITHOUT MERIT BECAUSE SHE FAILED TO SHOW A PATTERN OF SIMILAR INCIDENTS

Respondent's inadequate training claim is also without merit.[5] Respondent does not allege that Bryan County totally failed to train Burns regarding the reasonable use of force in arrests. Moreover, respondent has failed to identify any respect in which Bryan County's training program was so inadequate as to make it substantially likely that her Fourth Amendment rights would be violated. Indeed, respondent does not allege that the existing training program has resulted in any discernible pattern of constitutional violations. Consequently, there is no basis for imposing liability on Bryan County.

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[5] Because the failure to train claim was neither resolved by the court of appeals nor encompassed within the questions presented here, this Court need not address it. In a superseded opinion, however, the court of appeals correctly rejected respondent's failure to train claim, as a matter of law, on the ground that she had not shown a pattern of similar incidents. 53 F.3d at 1424-25. In its final opinion, the court of appeals did not address the failure to train claim.

Respondent's failure to train claim is subject to all of the legal requirements set forth above. Among other things, respondent must show that Bryan County's alleged failure to train Burns reflects "deliberate indifference" to her constitutional rights, *City of Canton*, 489 U.S. at 389-90, and constitutes a "direct" cause of her constitutional injury. *Id.* at 385, 389. To establish deliberate indifference, moreover, respondent must prove either that the alleged failure to train would produce constitutional violations to a "moral certainty," *id.* at 390 n.10, or that the municipality's training policies had resulted in a "pattern" of similar constitutional violations adequate to put the County on "notice." *Id.* at 397 (O'Connor, J., concurring in part and dissenting in part).

In this case, the record is uncontroverted that Burns did receive significant training on how to make proper arrests. Tr. 577-83. In particular, Burns had attended the State of Oklahoma's Council on Law Enforcement Education and Training (CLEET) Program, and the Reserve Academy at Hugo, Oklahoma. Tr. 578. Moreover, Burns received extensive on-the-job training with fully certified deputy sheriffs. Tr. 580. Accordingly, this case involves not a complete failure to train, but rather an allegation that, in essence, the municipality has allocated inadequate resources to an existing training program. In this circumstance, a plaintiff can establish deliberate indifference only by demonstrating, as the Fifth Circuit originally held in this case, *see* 53 F.3d at 1425, that the existing training program has resulted in a pattern of constitutional violations.

Because respondent does not allege a complete failure to train and has not shown a pattern of constitutional violations, it was not obvious that the existing training policy would produce constitutional violations. While that conclusion might be justified, for example, where a municipality provides absolutely no training on the use of deadly force, *see City of Canton*, 489 U.S. at 390 n.10, a dramatically different situation is presented here where the allegation is that a training program *actually pursued* was merely inadequate. If, for example, a municipality decides to present two days of training on *Garner*, five days on search and seizure, one day on identifying drunk drivers, and so on, and the plaintiff alleges that the municipality's *Garner* training was inadequate, a single incident of deadly force should not suffice to support a finding of municipal liability. In this situation, where only one incident has been shown, it is clearly neither "obvious" nor "morally certain" that the training program is significantly deficient. Only a pattern of violations, therefore, can establish the requisite deliberate indifference under these circumstances.

In *City of Canton* itself this Court made clear that in the absence of a pattern of incidents, challenges to the scope of an existing program cannot support a finding of deliberate indifference. The Court explained: "Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." 489 U.S. at 391. Absent any pattern of constitutional violations, such claims would quickly devolve into a regime of *de facto respondeat superior* liability. As Justice O'Connor has explained: "Without some form of notice to the city, and the oppor-

tunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *Id.* at 395 (O'Connor, J., concurring in part and dissenting in part). Moreover, absent a pattern of constitutional violations, claims such as respondent's would require federal judges and juries to closely scrutinize difficult resource allocation decisions—a result that *City of Canton* expressly sought to avoid. *See* 489 U.S. at 392 (Lower standard of proof "would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious question of federalism.").

Finally, respondent has not even identified any respect in which Bryan County's existing training program was inadequate. Indeed, even if respondent could establish that Burns was inadequately trained, this alone would not show that the County's training program was inadequate. As this Court explained in *City of Canton*, "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." 489 U.S. at 390-91 (citations omitted). For all of these reasons, respondent has failed to establish the elements required to impose liability on the County for inadequate training.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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June 21, 1996

APPENDIX

APPENDIX

SELECTED STATE LAWS WHICH DISQUALIFY LAW ENFORCEMENT OFFICER CANDIDATES ON THE BASIS OF CRIMINAL RECORD

I. STATES WHICH DISQUALIFY LAW ENFORCEMENT OFFICER CANDIDATES ON THE BASIS OF A FELONY CONVICTION

Alabama	Ala. Code § 36-21-46 (Michie Supp. 1995)
California	Cal. Gov't Code § 1029 (West 1995)
Kansas	Kan. Stat. Ann. § 74-5605 (Supp. 1995)
Maine	Code Me. R. § 227 ch. 3 (Weil 1995)
Massachusetts	Mass. Ann. Laws ch. 41, § 96A (Law. Co-op. 1993)
Michigan	Mich. Admin. Code r. 28.4102 (1979)
Minnesota	Minn. R. 6700.0700 (1993)
New York	N.Y. Town Law § 151 (McKinney Supp. 1996)
Ohio	Ohio Admin. Code § 109:2-1-03 (Baldwin 1995)
South Dakota	S.D. Admin. R. 55:02:14:02.01 (1995)
Virginia	Va. Code Ann. § 15.1-131.8 (Michie Supp. 1995)
Wisconsin	Wis. Admin. Code § LES 2.01 (1993)

II. STATES WHICH DISQUALIFY LAW ENFORCEMENT OFFICER CANDIDATES ON THE BASIS OF A FELONY CONVICTION OR SPECIFIC MISDEMEANOR CONVICTIONS

Alaska	Alaska Admin. Code tit. 13 § 85.010 (Michie Supp. 1996) (misdemeanors of dishonesty or moral turpitude; misdemeanors resulting in serious physical injury to another person; two or more D.W.I. offenses; certain drug offenses)

Arizona	Ariz. Admin. Code R13-4-105 (Supp. 1995) (certain drug offenses and a pattern of traffic violations showing disrespect for traffic laws and safety of others within last three years)
Colorado	Colo. Rev. Stat. § 24-31-304 (Bradford 1988) (crimes involving moral turpitude)
Connecticut	Conn. Agencies Regs. § 7-294e-16 (1995) (Class A or B misdemeanors)
Florida	Fla. Stat. Ann. § 943.13 (West Supp. 1996) (misdemeanors involving perjury or a false statement)
Georgia	Ga. Code Ann. § 92A-2108 (Harrison 1994) (crimes which could have resulted in imprisonment in a federal or state prison or misdemeanors showing a pattern of disregard for the law)
Illinois	Ill. Admin. Code tit. 5, § 1720.35 (Supp. 1993) (crimes of moral turpitude)
Indiana	Ind. Admin. Code tit. 250, r. 1-3-9 (1992) (crimes of moral turpitude)
Iowa	Iowa Admin. Code r. 501-2.1(80B) (1993) (crimes of moral turpitude)
Kentucky	502 Ky. Admin. Regs. 45:025 (1995) (crimes of moral turpitude)
Maryland	Md. Regs. Code tit. 12, § 04.01.01A (1993) (misdemeanors which could have resulted in imprisonment for one year or more)
Missouri	Mo. Ann. Stat. § 590.135 (Vernon Supp. 1996) (misdemeanors involving moral turpitude; certain drug offenses)
Montana	Mont. Code Ann. § 7-32-303 (1993) (crimes which could have resulted in imprisonment in a federal or state penitentiary)
Nebraska	Neb. Rev. Stat. § 81-1410 (1994) (crimes which could have resulted in imprisonment in a penitentiary for one year or more; D.W.I. within two years of hire)

New Jersey	N.J. Stat. Ann. § 40A:14-22 (West 1993) (crimes involving moral turpitude)
New Mexico	N.M. Stat. Ann. § 29-7-6 (Michie 1994) (crimes involving moral turpitude, aggravated assault, theft, D.W.I., or drug offenses within three years of hire)
North Carolina	N.C. Admin. Code tit. 12, r. 9B.0111 (Barclay Supp. 1995) (crimes which could have resulted in imprisonment for two years or more; Class B misdemeanors within 5 years of hire; more than three Class B misdemeanors overall; more than three Class A misdemeanors if any occurred within two years prior to hire)
Oklahoma	Okla. Stat. Ann. tit. 70, § 3311 (West Supp. 1996) (crimes involving moral turpitude)
Oregon	Or. Admin. R. 259-08-010 (1991) (perjury-related, sex, drug-related or pornography offenses)
Pennsylvania	Pa. Stat. Ann. tit. 53, § 774 (Purdon Supp. 1996) (serious misdemeanors)
Rhode Island	22 R.I. Admin. Code r. 96-080-01 (1992) (crimes involving moral turpitude)
South Carolina	S.C. Code Ann. § 23-23-50 (1989) (D.U.I. or leaving the scene of an accident within five years of hire)
Tennessee	Tenn. Code Ann. § 38-8-106 (Michie 1991) (crimes involving force, violence, theft, dishonesty, gambling, liquor or controlled substances)
Texas	Tex. Admin. Code tit. 37, § 211.80 (West 1996) (Class A misdemeanors within one year of hire; Class B misdemeanors within six months of hire; D.U.I. or D.W.I. within two years of hire; or on probation for Class A or B misdemeanor)
Utah	Utah Code Ann. § 53-6-203 (Michie 1994) (crimes which would have resulted in imprisonment in a state or federal penitentiary)

Vermont	Code of Vt. R. 80 070 001-17 (Weil 1994) (crimes involving moral turpitude)
Washington	Wash. Admin. Code § 139-05-220 (1995) (gross misdemeanors or misdemeanors involving moral turpitude or for which imprisonment in a federal or state penitentiary could have been imposed)
Wyoming	Wyo. Stat. Ann. § 9-1-704 (Michie 1995) (crimes which could have resulted in imprisonment in a federal penitentiary or state prison)

III. STATES WITHOUT DISQUALIFICATION STANDARDS FOR LAW ENFORCEMENT OFFICER CANDIDATES

Idaho	Idaho Admin. Code § 11.11.01.056 (Supp. 1995) (Peace Officer Standards and Training Council shall pass judgment individually on each applicant)
North Dakota	N.D. Cent. Code § 12-63-12 (Michie Supp. 1995) (crime determined by peace officer standards and training board to have a direct bearing on an individual's ability to perform the duties of a police officer)